Supreme Court, U. S.
FILED
MAY 6 1974
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1661

LOUIS S. KOVASH, JR.,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DON HAMILTON
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102

Counsel for Petitioner

April, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Reported Opinions	1
Jurisdictional Statement	1
Question for Review	2
Whether Petitioner's ability to prepare his defense and prepare for trial itself was unconstitutionally hampered, and his right to be confronted with witnesses against him unconstitutionally infringed, by the refusal of the trial court to require the State to disclose the identity of a confidential informant who was present at the time the alleged crime occurred	2
Constitutional and Statutory Provisions	3
Statement of the Case	3
When and How Federal Questions Raised	5
Argument	6
Petitioner's ability to prepare his defense and prepare for trial was unconstitutionally hampered and his right to be confronted with witnesses against him unconstitutionally infringed by the refusal of the trial court to require the State to disclose the identity of the confidential informant who was present at the time the alleged crime occurred	6
Conclusion	11

TABLE OF CONTENTS CONTINUED PAGE

APPENDIX

Appendix A—Excerpts From Testimony at Trial ..... i-vi

Appendix B—Opinion of Court of Criminal Appeals of the State of Oklahoma ..... vii-xvi

Appendix C—Order Denying Petition for Rehearing ..... xvi-xvii

Appendix D—American Law Institute, Model Code of Evidence, Rule 230 xviii

Appendix E—Discussion of Analogous Case (76 A.L.R.2d 290)—People v. McShann, 50 Cal.2d 802, 330 P.2d 33 (1958) ..... xviii-xix

TABLE OF AUTHORITIES

CASES:

Bruner v. U. S., 293 F.2d 621 (5th Cir. 1961) 6

Cochran v. U. S., 291 F.2d 633 (8th Cir. 1961) 6

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) 11

Kovash v. State, 519 P.2d 520 ..... 9, 10

McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967) 9

Miller v. U. S., 273 F.2d 279 (5th Cir. 1959) 7-8

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 10-11

Roviaro v. U. S., 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) 6, 7, 8

U. S. v. Kelly, 449 F.2d 329 (9th Cir. 1971) 8

U. S. v. Mendoza, 433 F.2d 891 (5th Cir. 1970) 8

AUTHORITIES CONTINUED

PAGE

U. S. v. Whiting, 311 F.2d 191 (4th Cir. 1962), cert. denied 372 U.S. 935, 9 L.Ed.2d 766, 83 S.Ct. 882 (1963) 6

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Amendment V 3
Amendment VI 3
Amendment XIV 3

STATUTES:

28 U.S.C. §1257(3) 2

MISCELLANEOUS:

Revised Rules of the Court of Criminal Appeals of the State of Oklahoma, Rule 1.17(c) 2

Revised Rules of the Supreme Court of the United States, Rule 22(1) 2

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. ----------

LOUIS S. KOVASH, JR.,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

COMES NOW Louis S. Kovash, Jr., and petitions this Court for a Writ of Certiorari to review the final judgment of the highest court hearing criminal cases in the State of Oklahoma, to-wit: The Oklahoma Court of Criminal Appeals, and for cause alleges and states:

1. REPORTED OPINIONS

This case is reported unofficially at 45 Oklahoma Bar Journal 455, and officially at 519 P.2d 517 (1974).

2. JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was both dated and entered February 11, 1974. Pursuant to Rule 1.16 of the Rules of the Court of Criminal Appeals of the State of Oklahoma, Petitioner, Louis A. Kovash, Jr., filed his Peti-

tion for Rehearing on February 26, 1974. The Court of Criminal Appeals of the State of Oklahoma entered and filed its Order Denying Petition for Rehearing on February 28, 1974; therefore, under Rule 22(1), Revised Rules of the Supreme Court of the United States, this Petition is properly filed inasmuch as pursuant to Rule 1.17(c) of the Rules of the Court of Criminal Appeals of the State of Oklahoma, after a Petition for Rehearing is denied or in which an opinion is rendered on rehearing, no further motions or applications will be considered. Rule 1.17(c) states:

> "If any case in which a petition for rehearing is denied, or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed, and the clerk shall not file any such motions or applications."

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257(3).

3. QUESTION FOR REVIEW

The question presented for review herein is:

Whether Petitioner's ability to prepare his defense and prepare for trial itself was unconstitutionally hampered, and his right to be confronted with witnesses against him unconstitutionally infringed, by the refusal of the trial court to require the State to disclose the identity of a confidential informant who was present at the time the alleged crime occurred.

4. CONSTITUTIONAL AND STATUTORY PROVISIONS

"AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

"Section 1 * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

"No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

5. STATEMENT OF THE CASE

Petitioner was charged August 17, 1972, in the District Court within and for Oklahoma County, State of Oklahoma, with the crime of Unlawful Distribution of Controlled Substance, Barbiturate, which said unlawful distribution was alleged to have occurred on the 29th day of June, 1972. The

Information asserted that the Petitioner unlawfully distributed barbiturates to Officer Mike Brown on that date.

Preliminary Hearing was held December 22, 1972, and Petitioner was held for trial, to which ruling of the Court the Petitioner excepted and exceptions were allowed.

The matter proceeded to trial on February 6 and 7, 1973. At the trial, the State produced Officer Mike Brown, Oklahoma City Police Department, who testified that at 4:40 a.m. June 29, 1972, he and a confidential informant observed Petitioner sitting in an automobile at the Zig-Zag Restaurant in Oklahoma City. He described the place as a hangout for hippies, most of whom are around 16 or 17 years of age. He further testified that he and the confidential informant went to the restaurant to make a purchase of illegal drugs. They went inside the restaurant and made contact with a person known only as "Goat." He testified he and the confidential informant watched Goat go out to the car in which Petitioner was sitting, and although they could not hear the conversation, he and the confidential informant saw Goat talking with a person. Immediately thereafter, Goat returned to Officer Brown and the confidential informant, and had a conversation with them, and then the party he identified as Petitioner got out of the car and walked toward Goat in the parking lot. He related that Goat's hands were in sight at all times, and that he saw Petitioner reach into his pocket and pull out something, although he could not identify it, and hand it to Goat. Goat immediately, while still in his view, walked directly to Officer Brown and gave him twelve capsules which he had in his hand. Throughout the entire transaction, the confidential informant accompanied Officer Brown, and was

in close proximity to Officer Brown throughout the events described by Officer Brown at trial. Petitioner demanded that the identity of the confidential informant be disclosed, the trial court refused to require disclosure, and the State failed to voluntarily disclose the identity of the confidential informant. (See Appendix A.)

On March 2, 1973, Petitioner filed a Motion for New Trial, Application for Suspended Sentence, and Motion in Arrest of Judgment. Petitioner's Motions were overruled, and application denied. The court, in accordance with the verdict of the jury, sentenced the Petitioner to serve a term of three years in the custody of the Oklahoma Department of Corrections.

Petitioner perfected his appeal to the Court of Criminal Appeals, State of Oklahoma, and on February 11, 1974, said Court affirmed the Judgment and Sentence hereinbefore entered. (See Appendix B.) On February 26, 1974, Petitioner filed his Petition for Rehearing which was denied by the Court of Criminal Appeals of the State of Oklahoma on Februady 28, 1974. (See Appendix C.)

6. WHEN AND HOW FEDERAL QUESTIONS RAISED

The federal questions being presented herein were first raised in Petitioner's trial by Petitioner's attorney on cross-examination as found in the passage beginning at page 19 of the Transcript of Trial Proceedings had February 6 and 7, 1973. (Appendix A.) Petitioner moved for a mistrial for the reasons that the cases are explicit that the witness himself uses confidential informants in his testimony and refuses to identify them, then the need of the Defendant to

know who is involved in the case overcomes the privilege that the police have to protect the informants. Petitioner specifically relied on this Court's ruling in *Roviaro* v. *U. S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), in that argument.

7. ARGUMENT

PETITIONER'S ABILITY TO PREPARE HIS DEFENSE AND PREPARE FOR TRIAL WAS UNCONSTITUTIONALLY HAMPERED AND HIS RIGHT TO BE CONFRONTED WITH WITNESSES AGAINST HIM UNCONSTITUTIONALLY INFRINGED BY THE REFUSAL OF THE TRIAL COURT TO REQUIRE THE STATE TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT WHO WAS PRESENT AT THE TIME THE ALLEGED CRIME OCCURRED.

The confidential informant referred to by Officer Brown was present throughout the period in which Officer Brown alleges Petitioner committed the crime with which he was charged. Because of the State's refusal to reveal the identity of the informant, Petitioner was unable to prepare a meaningful defense since he was not able to question and confront a person who was present when the alleged crime took place.

Disclosure of the identity of an informer is required where disclosure is essential or relevant and helpful to the defense of an accused. *Roviaro* v. *U. S.*, *supra*; *U. S.* v. *Whiting*, 311 F.2d 191 (4th Cir. 1962), *cert. denied* 372 U.S. 935, 9 L.Ed.2d 766, 83 S.Ct. 882 (1963); *Cochran* v. *U. S.*, 291 F.2d 633 (8th Cir. 1961); *Bruner* v. *U. S.*, 293 F.2d 621 (5th Cir. 1961).

In cases such as the one presented herein, disclosure of the identity of an informant has been required. In *Roviaro* v. *U. S.*, *supra*, this Court held that where the informer had taken a material part in the crime alleged, and was the only witness in a position to amplify or contradict the testimony of the government witnesses, the privilege generally afforded the government to withhold the identity of the informant disappears. This Court stated at 353 U.S. 60:

> "A further limitation on the applicability of the privilege [to withhold disclosure] arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or the content of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

The case at bar is exactly the type of situation which was envisioned by this Court in *Roviaro*. Here the only person other than himself who could contradict the government witness' testimony was the confidential informant. Further, the confidential informant was present throughout the transaction which gave rise to the prosecution herein. The distinction between informer cases, such as the one here involved where the informer was present and those cases in which the informer was merely an informer and was not necessarily present at the time of the alleged crime, should be kept in mind. For example, the 5th Circuit held, in *Miller* v. *U. S.*, 273 F.2d 279 (5th Cir. 1959), that the identity of the informer need not be disclosed in a particular context. The Court explained:

> "We think the circumstances of this case differ crucially from those cases in which disclosure was re-

quired. * * * *We are not dealing with one who was an active participant in the crime nor with one whose presence gave the atmosphere of confidence during critical moments and who would have been able to testify directly about the very transaction constituting the crime.*" (Emphasis supplied.) 273 F.2d 281.

The basic test required to determine whether the privilege should give way is one of balancing the public policy considerations against the Petitioner's right to adequately prepare his defense. *Roviaro, supra*; *U. S.* v. *Mendoza*, 433 F.2d 891 (5th Cir. 1970). Of course, Petitioner has the burden of showing the need for disclosure. *U. S.* v. *Kelly*, 449 F.2d 329 (9th Cir. 1971). The Court, in *Kelly*, noted that mere speculation that an informer may be of some help is not sufficient to overcome the public interest in the protection of the informer. *Kelly, supra*, goes on to state at 449 F.2d 330:

> "The Appellant here has not met his burden. He merely speculates as to the relevance of the informant's testimony.
>
> "The facts of his case, moreover, do not suggest the testimony would have been relevant. The informant neither witnessed the crime nor transacted business with the defendant. * * * Appellant's sole suggestion was that the informant could 'shed light on the conspiracy.' "

With respect to the case at bar, it can easily be seen that there has been a showing of need as required by *Roviaro* since, by the testimony of the police officer, the informant was apparently present when the acts complained of occurred. Petitioner could not properly prepare for trial without the disclosure of the informant's identity.

Moreover, the very situations which *Roviaro, supra, Miller, supra,* and *Kelly, supra,* envisioned as cases which would justify disclosure of an informant's identity are present in this case. See also ALI Model Code of Evidence, Rule 230 (Appendix D). It was, therefore, error of the trial court to refuse to require the State to disclose the identity of the informer. A further discussion of the point is found in Appendix E.

In addition to the above, Petitioner would point out that several statements made by the Court of Criminal Appeals of the State of Oklahoma illustrate how that Court misconstrued both the facts and the law in the case at bar. The Court cites *McCray* v. *Illinois*, 386 U.S. 300, 361, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), for the proposition that:

> "Although the officer provided the only testimony as to the evidence that constituted the illegal conduct, there is nothing in the due process clause of the Fourteenth Amendment that requires an assumption that the officer was committing perjury. [Citing *McCray* v. *Illinois*, supra]." *Kovash* v. *State*, 519 P.2d at 520.

A reading of *McCray, supra,* will illustrate that this Honorable Court had before it in that case not the fact situation presented in the case at bar, but a question of probable cause and its relation to a search incidental to an arrest. The informant in *McCray* was not present with the police officer when the acts complained of occurred, and, therefore, that case has little, if any, bearing on the case at bar. Moreover, it is not Petitioner's contention that the due process clause of the Fourteenth Amendment requires an assumption that the officer was committing perjury, nor was it ever. Petitioner's contention is, and always has been,

that he has not been able to examine the man who had been involved in the entire transaction and could not know whether that informant might have thrown doubt upon the Petitioner's identity, the identity of the other parties involved, or might have contradicted or refuted facts presented by the police officer.

The Oklahoma Court of Criminal Appeals next stated:

> "The testimony of the officer was not contradicted or refuted." *Kovash, supra,* at 520.

The very point being presented by Petitioner throughout the proceedings herein is that due to the failure of the State courts to require disclosure of the identity of the informer, Petitioner has no way of presenting any such refutation without giving up his Constitutional privileges. Petitioner asserts that it is fundamentally unfair to rely on the fact that the testimony of the police officer was not contradicted or refuted when he was deprived of the right to properly prepare his defense.

Further, such refusal served to deny Petitioner of his right to be confronted with witnesses against him. As was illustrated in the testimony referred to above and in Petitioner's Motion for Mistrial, T.T. 20, the police officer referred numerous times at the trial to the informant being with him when various acts occurred. In essence, then, Petitioner was being testified against by not only Officer Brown, but also the confidential informant. Certainly, this was a gross violation of Petitioner's rights to be confronted by witnesses against him, a federal constitutional right extended to the states in *Pointer* v. *Texas*, 380 U.S. 400, 85

S.Ct. 1065, 13 L.Ed.2d 923 (1965), and *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Therefore. it becomes clear that the identity of the confidential informant should have been disclosed at trial, and the failure to do so violated Petitioner's rights to due process in the very type of case involved in *Roviaro, supra*, and subsequent cases as set out above, and further, violated Peitioner's right to be confronted with witnesses against him.

CONCLUSION

Petitioner was substantially prejudiced by the trial court's refusal to require disclosure of the identity of the confidential informant. The informant had been present throughout the transactions which gave rise to the charge herein, and was in a position to amplify or contradict the testimony of Officer Brown. Petitioner was unduly hampered in his trial preparation and, therefore, was denied a fair trial inasmuch as it was impossible for him to bring forth the only witness other than himself who could shed light on the transactions in dispute. Certainly, Petitioner should not be placed in the position of having to relinquish his right to remain silent throughout the trial merely because the State of Oklahoma refused to identify a witness who could have been quite helpful.

Additionally, due to the method of examination employed by Officer Brown at trial, Petitioner was, in effect, being denied the right to confront witnesses against him.

In short, Petitioner was denied his right to a fair trial, was further denied due process of law by the transactions and occurrences complained of herein.

Respectfully submitted,

DON HAMILTON
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102

Counsel for Petitioner

April, 1974

APPENDIX A

Excerpts from transcript of trial:

Q (BY MR. HAMILTON) But you don't remember whether that was a Saturday or Sunday or Tuesday, do you?

A No, I do not.

Q Can you tell us on the week of seven days prior to June 29th, and seven days subsequent to that date, how many times you went to the Zig Zag Restaurant?

A No, I don't recall.

Q Did you go more than once?

A Yes, probably.

Q Did you go more than five times?

A I would imagine I went most every day. I spent most every day at the Zig Zag Club at that time in my investigation.

Q Was that basically your assignment?

A That was just the area I went to. I wasn't assigned to any particular area of the City. I was free to go anywhere in the City I wanted to.

Q Throughout your testimony you referred to yourself and a confidential informant being involved in this matter.

Who was this informant?

A His name?

Q Yes.

MR. WARREN: Judge, I would object.

THE COURT: Sustained.

Q (BY MR. HAMILTON) It is your testimony today that you want to prosecute this man without identifying who was with you?

MR. WARREN: I object to that.

THE COURT: That is improper, yes, sustained.

Q (BY MR. HAMILTON) Do you refuse to tell us who it was?

THE COURT: Mr. Hamilton, that is an improper inquiry. The Court sustained the objection.

(Whereupon, the following proceedings occurred at the Reporter's desk out of the hearing of the jury:)

MR. HAMILTON: Comes now the defendant and moves for a mistrial for the reason that the cases are explicit that at a preliminary hearing it is not required to name confidential informants, but when the witness himself uses confidential informants in his testimony and refuses to identify them, then the benefit to the defendant to know who is involved in the case overcomes the privilege that the police have to protect the informants. That is the established law from the United States Supreme Court.

MR. WARREN: I have no objection if Mr. Hamilton wants to show us the law. I have not seen that law.

THE COURT: All right, I am not aware of it either. If you say it is I will give you an opportunity to show me.

MR. HAMILTON: Okay, could we have about five minutes?

THE COURT: Yes.

(To the jury) Ladies and gentlemen, it will be necessary for us to take a recess for just a few moments, to check a legal matter here.

I am estimating, but I imagine it will be about ten minutes. So, we will take a recess at this point for about ten minutes. Thank you.

(Whereupon, a recess was taken at 1:55 o'clock P.M.)

(Whereupon, the following proceedings occurred in the Court's chambers, out of the hearing of the jury.)

THE COURT: Let the record show that this proceedings is being conducted in the Court's chambers with the Assistant District Attorney and counsel for the defendant and the Court now asks the counsel for the defendant whether he will waive having the defendant present in here in person.

MR. HAMILTON: Yes.

THE COURT: For this purpose.

MR. HAMILTON: Yes, I do waive it.

THE COURT: All right, in support of the defendant's motion for mistrial for the Court failing to permit the witness to name the informant, the counsel for the defendant has furnished the Court several cases, among which is a quotation from the United States Supreme Court in *Roviaro* vs. *United States*, 353 U.S. 53; 77 Sup. Ct. 623; 1 Law Edition 2d. 639.

A review of this Roviaro Case indicates that the naming of an informant is within the discretion of the Court and in the furtherance of justice and the privilege of the informant to remain anonymous must give way to the needs of the defendant, if he can show any important element for disclosure, or if he can show any prejudice to the defendant in the absence of the name of the informant.

Now, in light of that, let me ask counsel for the defendant how he feels that such name would be important to his defense in this case.

MR. HAMILTON: May it please the Court, this witness has testified at this time, although he did not so testify during the preliminary hearing, that this confidential informant was with him at every material time he's testified to.

First, he went to the Zig Zag Restaurant; second, when he first met Goat; third, when he saw the defendant that is on trial today and Goat walked past them five feet away; third, when he and this confidential informant were in a position ten feet away to observe Goat and this defendant.

We feel, first of all we don't know who this confidential informant is and we feel that if we did know that it might be possible that his recollection of these events might be different than this man's that is testifying now. We feel we should have before this jury all the evidence that is relevant to what actually did take place out there on that date, time and place that we know about.

We further feel what this witness is trying to do is lend a little bit of credence to his own testimony by saying "We were there, we saw this, we saw that, we were in a position where they passed five feet from us," lending a little bit more credence to his own testimony than possibly it should be and certainly more than was at the preliminary hearing.

Had we known this confidential informant was with him throughout all these proceedings we would have by proper motion, prior to trial, tried to learn the name of this confidential informant.

We feel we should know who he is and if he is material to our case, we would present him.

MR. WARREN: I would point out to the Court that preliminary hearing was had on this particular case on December 22nd, 1972, and I believe the preliminary hearing transcript will reflect that the testimony of Officer Mike Brown is substantially the same, in relating as to what was done out at the Zig Zag Club on this particular—the early morning hours of this particular day and that defense counsel was aware that there was a confidential informant at this time and this case is now being tried on February the 6th, 1973, and counsel for the defendant has had over a

month to file a proper motion and attempt to get the disclosure of this particular individual's name.

MR. HAMILTON: Now, the preliminary—

THE COURT: (Interposing) Does the State desire to keep the name of this informant confidential for any particular purpose?

MR. WARREN: The purpose, Your Honor, any time that any confidential informer is disclosed as to his name, it completely eliminates any further use of him in any narcotics investigation, it is for the sake of his own protection in addition to further use of him in narcotics investigation.

THE COURT: All right, we are now in the middle of the testimony of the first witness for the State. The trial has just begun.

Does the State anticipate any evidence at all that would require something from the informant or require him to be here for any purpose on behalf of the State?

MR. WARREN: The evidence that has been presented through Officer Mike Brown at this particular time has substantially covered all the material facts of this case, and the State does not anticipate any further introduction of evidence which would relate to the confidential informant, as to his participation in this act.

The State does intend to call Detective McBride who will testify as to what he observed on surveillance, but it would not be substantially different than what Officer Brown has heretofore testified to.

THE COURT: All right.

MR. HAMILTON: Up until this time, Your Honor, I was of the opinion, from the transcript, that this informant had gone to the area with this undercover agent, but this idea that they walked five feet in front of us, they stood ten feet in front of us when they made this transfer, we have

never had that type testimony before in this case and what we don't know—what we believe is that the purpose of that type testimony is to get this jury to thinking "Well, here's several people, us," and then bring on the surveillance unit that will probably—the surveillance unit will probably say he observed him and the confidential informant and these people walked past. That is not fair to the defendant to put that type testimony on against him if they are not going to tell who they are.

THE COURT: The Court feels that based on this Ravario Case, it is a matter of discretion and the Court feels that the rights on both sides have equitable basis in law and in fact at this point I am going to overrule the motion for mistrial. I am going to sustain my former ruling that the witness is not required to divulge the name of the informant, but without prejudice to being raised later again in the trial if you see some other area that makes it appear that in justice the defendant does have to have this identity made known.

(The Court, jury, counsel and the defendant all being present as heretofore, the proceedings continued at 2:40 o'clock P.M., as follows:)

THE COURT: Ladies and gentlemen, sometimes it takes longer to find and settle questions of law than I anticipate. I think we are ready to proceed.

You may proceed, Mr. Hamilton.

Q (BY MR. HAMILTON) Now, Officer, referring back to the first time you first talked about June 29th, 1972, have you had an occasion now to refresh yourself as to what day of the week that was?

A No, I haven't.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

FILED
In Court of Criminal Appeals
State of Oklahoma
FEB 11 1974
Ross N. Lillard Jr.
Clerk

LOUIS S. KOVASH, JR.,	]	
	]	
Appellant,	]	
	]	
-vs-	]	No. F-73-232
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

-OPINION-

BUSSEY, J.:

Appellant Louis S. Kovash, Jr., hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Oklahoma County, Case No. CRF-72-2097, for the offense of Unlawful Distribution of Controlled Substance, Barbiturate. His punishment was fixed at three (3) years imprisonment, and from said judgment and sentence a timely appeal has been perfected to this Court.

At the trial, Officer Michael Brown of the Oklahoma City Police Department testified that on June 29, 1972, he was assigned as an undercover narcotics officer with the vice detail. Officer Brown further testified that on that date he, along with a confidential informant, went to the Zig Zag

Club, located in Oklahoma City, for the purpose of looking for narcotics dealers. He testified that at the Zig Zag Club he met a man known only as "Goat." Officer Brown testified that he and the confidential informant went out to the parking lot with Goat and once outside Goat saw a car across the parking lot and ran over to it and began talking to the defendant who was in the car. He indicated that Goat then returned to him and the informant and the defendant got out of the car and started walking toward them. Officer Brown stated that Goat once again left them and met the defendant as he walked across the lot and the two of them (Goat and the defendant) walked about ten feet past him and stopped at a location about five feet from the door of the club. This witness further testified that the defendant then removed something from his right front pants pocket, with his right hand, and placed it in Goat's left hand. The defendant then walked into the Zig Zag Club and Goat walked directly to Officer Brown. Officer Brown indicated that Goat's left hand was in complete view from the time that the defendant placed something in it until Goat walked over to Brown, reached out his left hand, and placed twelve (12) red capsules into Officer Brown's right hand. Upon receiving the capsules, Officer Brown then gave Goat $6.00 in State evidence money. Officer Brown further testified that Goat placed the $6.00 in a pouch at his side and returned inside the club. Officer Brown and the informant remained outside the club for a brief period and then also went back into the club where they remained for approximately 15 minutes during which time the defendant and Goat did not come in contact with each other. Officer Brown and the informant left the club and drove to a prearranged location where the evidence was turned over to Detectives Cochrane and McBride of the Oklahoma City Vice Detail.

Narcotics Detective David McBride of the Oklahoma City Police Department, testified that on June 29, 1972, he,

along with Detective Cochrane, conducted surveillance of Officer Mike Brown at the Zig Zag Club from a location across the street. Testimony from Detective McBride substantiated Officer Brown's testimony as to the movement of the parties in the parking lot. He also identified State's Exhibit # 1 as the red capsules given to him by Officer Brown.

The defendant stipulated that the Crime Bureau made an analysis of the capsules. Defendant also stipulated that the Chemical Analysis Report stating that the evidence was "identified as containing barbiturate" could be admitted. Defendant further stipulated that the evidence could be offered without objection.

The defendant did not take the stand and offered no evidence in his behalf.

Defense counsel argues, in his first proposition, that the trial court erred in refusing to require the State to disclose the identity of a confidential informant. In asserting error, defense counsel has relied upon *Roviara* v. *United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1959). In *Roviara, supra,* the informant whose identity was sought had been an active participant in the illegal activity. The informant had not only helped set up the crime, but had also been a participant in the actual conduct that was a crime. Under circumstances similar to those found in *Roviara*, supra, this Court feels that it is error to fail to disclose the identity of the informant provided a timely request for such identification has been made. However, in the instant case, we are dealing with circumstances that differ crucially from *Roviaro,* supra. The informant did not take an active part in the occurrence in any way. He had not set up the meeting, nor was he a participant in the exchange that constituted the illegal conduct. Apparently, this is the first time that this Court has been called upon to speak to the issue presented in the instant case; however, the Court of Special Appeals of Maryland addressed the same issue in

Whittington v. *State*, 8 Md.App. 676, 262 A.2d 75 (1970). This Court agrees with the decision reached by the Maryland Court, that under the circumstances presented in the instant case, it is not necessary that the State divulge the identity of the confidential informant. In the instant case, at the time defense counsel sought the identity of the informant, there was nothing in evidence that concerned the informant except that he was present when the undercover officer obtained the barbiturate. Testimony was not in conflict and there was no assertion that the informant had been involved in the transaction. The undercover agent had described the occurrence in full detail and defense had cross-examined. Although the officer provided the only testimony as to the events that constituted the illegal conduct, there is nothing in the due process clause of the Fourteenth Amendment that requires an assumption that the officer was committing perjury. See *McCray* v. *Illinois*, 386 U.S. 300, 361, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967). The testimony of the officer was not contradicted or refuted. The burden is upon the defense to show that the preponderance of the evidence substantiates that disclosure relevant to a fair defense. This the defense did not do in the instant case. We cannot, therefore, say that there was an abuse of judicial discretion, under these circumstances, by the trial court's refusal to require that the State disclose the informant's identity.

In defense counsel's second proposition, it is argued that the trial court erred in permitting the jury to have reread to them, during their deliberation, certain portions of testimony from the trial. Title 22 O.S. 1971, § 894 states:

> "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be

given in the presence of, or after notice to county attorney and the defendant or his counsel, or after they have been called."

We have carefully examined the record and have found that the circumstances that surround the re-reading of the testimony in the instant case are in compliance with the statutory requirements. This Court has interpreted this statute as not creating an absolute right to have testimony re-read, but a matter left to the discretion of the trial court subject to review by this Court. *Jones* v. *State*, Okl.Cr., 456 P.2d 610 (1969). In the instant case, the trial court insured that only that portion of the testimony over which the jury disagreed was re-read. We cannot say that to allow this re-reading of testimony was an abuse of the trial court's discretion.

It is defendant's third proposition of error that the trial court erred in overruling his pre-trial Motion to Quash Information, Demurrer, and Special Appearance and Motion to Quash Preliminary Hearing. It is argued that the Information alleges a sale by the defendant to Officer Brown. We have carefully examined the subject Information and find no merit to this contention. The Information charges the defendant with Unlawful Distribution, and not sale. The reference to sale found in the Information relates to the manner employed to accomplish the distribution and is not the basis for the charge. Defendant further argues that the evidence presented at the preliminary hearing was insufficient to bind the defendant over for trial. This Court has held that on preliminary hearing the State is only required to show that a crime has been committed, and probable cause that the defendant committed the crime, to have the accused bound over. Title 22 O.S. 1971 § 264; *Mark* v. *State*, 94 Okl.Cr. 425, 237 P.2d 459 (1951); *Lyon* v. *State*, 55 Okl.Cr. 226, 28 P.2d 598 (1934). Testimony in the preliminary hearing indicated that Officer Brown had purchased 12 red capsules from Goat, which proved to be barbiturates.

From the testimony, there was a reasonable inference that these capsules had been given to Goat by the defendant. Thereby, there was established reasonable cause to believe that the defendant had committed the crime set forth in the Information and we will not disturb the decision of the magistrate.

In defense counsel's fourth proposition, it is urged that the trial court erred in overruling defendant's pre-trial Special Motion to Dismiss. Defendant asserts that the passage of time from the commission of the crime on the 29th day of June, 1972, until the filing of the Information on the 17th day of August, 1972, was unreasonable. In *U. S.* v. *Marion*, 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468 (1971), the United States Supreme Court, in ruling that a time period of three years between the commission of a crime and the filing of the indictment was not violative of due process, stated:

> "On its face, the protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. . . . Our attention is called to nothing in the circumstances surrounding the adoption of the Amendment indicating that does not mean what it appears to say. . . ."

In the instant case, the time period that is asserted is not that which falls under the "speedy trial" provision in *U. S.* v. *Marion*, supra. The filing of the Information in the instant case was well within the three year statute of limitations period provided in 22 O.S. 1971, § 152. In *Walters* v. *Sam Williams, District Judge of Grady County*, Okl.Cr., 474 P.2d 661 (1970), in paragraph 4 of the Syllabus, this Court stated:

> "A person can be charged by preliminary information any time prior to the running of the statute of limitations prescribed for the alleged crime."

We, therefore, find this proposition of error to be without merit.

Defendant argues, in his fifth proposition, that the trial court erred in refusing to strike statements made by the prosecuting attorney during closing argument and overruling motions for mistrial based on these statements. This Court, in *Harvell* v. *State*, Okl.Cr., 395 P.2d 331 (1964), stated:

> "The right of argument contemplates a liberal freedom of speech, and the range of discussion, illustration and argumentation is wide. Counsel for both the State and the defendant have a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom. It is only when argument by counsel for the State is grossly improper and unwarranted upon some point which may have affected defendant's rights that a reversal can be based on improper argument."

We have carefully examined the closing arguments of both parties and feel that all but one of the statements made by the prosecuting attorney were valid inferences from the evidence. We are of the opinion that the call for the jury "to answer the public's cry" by the prosecuting attorney was improper and immaterial to the issues before the jury. Although we feel that such argument was improper, such defect was cured by the trial court's admonition to the jury that their duty was "to try this defendant on this evidence and not respond to anything else that the public may be asking for." *Songer* v. *State*, Okl.Cr., 464 P.2d 763 (1969). Furthermore, it does not appear that the jury was prejudiced by these remarks in that the statute provides for a sentence of not less than two (2) years nor more than ten (10) years imprisonment and a fine of not more than Five Thousand Dollars ($5,000.00), and in the instant case the

jury imposed punishment of three (3) years imprisonment and no fine.

In defendant's sixth proposition, it is submitted that the trial court erred in ruling that State's Exhibit # 2 fell within the legal definition set forth in Schedule III pursuant to 63 O.S. 1973 Supp., § 2-208(A)(1) of the Controlled Dangerous Substance Act. State's Exhibit # 2 (Chemical Analysis Report) stated that the evidence contained "barbiturate" instead of employing the language found in the statute that the evidence contained "a derivative of barbituric acid, or any salt of a derivative of barbituric acid." *Webster's Third New International Dictionary* (1963) and *Webster's New Collegiate Dictionary* (1973) define barbiturate as a "sale or ester of barbituric acid." In Mallory, *Medical Dictionary for Lawyers*, (2nd Ed. 1951), barbiturate is defined as a "salt of barbituric acid." In *Jefferson* v. *State*, 34 Okl.Cr. 56, 244 P. 460 (1926), this Court, in quoting from *Barr* v. *State*, 28 Okl.Cr. 392, 231 P. 322 (1924), stated:

> " 'Judicial notice will be taken of scientific facts which are universally known, or which may be found in the standard dictionaries. . . .' "

We, therefore, find this proposition to be without merit.

In defense counsel's seventh proposition, it is submitted that the trial court erred in ruling that the defendant could not argue the Oklahoma Statutes concerning eligibility for suspended sentences, deferred sentences and parole. This Court has held that the province of the jury is the determination of fact involving the guilt or innocence of the accused. *Disheroon* v. *State*, Okl.Cr., 357 P.2d 236 (1960). This Court has further held that it is improper and error for the trial court to instruct the jury as to the possible reduction of the sentence imposed by pardon and parole or deductions for good behavior. *Cox* v. *State*, Okl.Cr., 491 P.2d 357 (1971). Also, this Court has held that it is improper for

the prosecuting attorney to put these matters before the jury in his final argument. *Tucker* v. *State*, Okl.Cr., 499 P.2d 458 (1972). Although this Court has never before spoken to the situation now presented, the situation of defense counsel arguing that there can be no reduction in sentence is analogous to the above circumstances in that such argument is outside the province of the jury. We, therefore, find that to allow defense counsel to argue eligibility for suspended sentences, deferred sentences and parole would be improper and we find this proposition to be without merit.

It is defendant's last proposition that the trial court erred in refusing to consider the defendant's application for suspended sentence. Title 63 O.S. 1971, § 2-401B(2) provides for the punishment upon conviction for the crime in the instant case of Unlawful Distribution of Controlled Substance, and further provides that:

> "Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation."

We have previously examined this statute and upheld its constitutionality. *Black* v. *State*, Okl.Cr., 509 P.2d 943 (1973); *Disheroon* v. *State*, 514 P.2d 685 (1973). In light of *Black*, supra, and *Disheroon*, supra, we find this proposition to be without merit.

Having reviewed all the contentions of defendant, and finding them to be without merit, we conclude that the judgment and sentence appealed from must be, and the same is hereby, *AFFIRMED*.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA, HONORABLE FLOYD L. MARTIN, JUDGE.

LOUIS S. KOVASH, JR. was convicted of the crime of Unlawful Distribution of Controlled Substance, Barbiturate;

was sentenced to serve three (3) years imprisonment, and appeals. *AFFIRMED.*

DON HAMILTON and JON L. HESTER,
Attorneys for Appellant,

LARRY DERRYBERRY, ATTORNEY GENERAL,
JAMES L. SWARTZ, ASST. ATTY. GENERAL,
STAN CHATMAN, LEGAL INTERN,
Attorneys for Appellee.

OPINION BY BUSSEY, J.
BLISS, P.J., Concurs,
BRETT, J., Specially Concurs.

BRETT, J.: Special Concurrence.

I concur that this conviction should be affirmed, but I reserve my position with reference to the trial court's inherent authority to suspend, or defer, a judicially imposed sentence, as stated in my dissent to *Black* v. *State*, supra.

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

FILED
In Court of Criminal Appeals
State of Oklahoma
FEB 28 1974
Ross N. Lillard Jr.
Clerk

LOUIS S. KOVASH, JR.,	]	
	]	
Appellant,	]	
	]	
-vs-	]	No. F-73-232
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

- ORDER DENYING PETITION FOR REHEARING -

WHEREAS, this Court having carefully examined the Petition for Rehearing filed in the above styled and numbered cause, and being fully advised in the premises, is of the opinion that said Petition for Rehearing should be, and the same is hereby DENIED.

The Clerk of this Court is directed to issue the Mandate FORTHWITH. IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 28th day of February, 1974.

s/ C. F. Bliss, Jr.

t/ C. F. BLISS, JR., PRESIDING JUDGE

s/ Hez J. Bussey, Judge

t/ HEZ J. BUSSEY, JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.

CLERK

APPENDIX D

The American Law Institute, Model Code of Evidence, Rule 230

"A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed, or (b) *disclosure of his identity is essential to assure a fair determination of the issues.*" (Emphasis supplied.)

APPENDIX E

Certainly in the instant case the disclosure of the identity of the confidential informant was essential to assure a fair determination of the issues. At 76 ALR 2d 290, is discussed the necessity of disclosing identity of non-participant informer as discussed in People v. McShann, 50 Cal. 2d 802, 330 P. 2d 33 (1958). That Court stated:

> "Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be 'relevant and helpful to the defense of the accused or essential to a fair determination of a cause' even though the informer was not a participant. For example the testimony of an eye witness-nonparticipant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously be relevant and helpful to

the defense of the accused and essential to a fair determination of the cause.

"Disclosure is frequently a problem in such cases as the present one involving violations of the narcotics laws, when the so-called informer is also a material witness on the issue of guilt. A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged.' * * * His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial. Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal." *Roviaro*, supra.

CERTIFICATE

This is to certify that this Petition for Writ of Certiorari was served this 2d day of May, 1974 by mailing three copies hereof, postage fully paid to

Curtis P. Harris
District Attorney of Oklahoma County
Court House
Oklahoma City, Oklahoma 73102

Larry Derryberry
Attorney General, State of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105

ORIGINAL SIGNED BY
DON HAMILTON

DON HAMILTON